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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 392

UNION PROPERTIES, INC.,
Petitioner,

vs.

FRANK M. BRENNAN,
Successor Treasurer of Cuyahoga County,

and

RICHARD C. WERNER,
Administrator of Estate of Leslie R. Monroe,
Deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

THOMAS V. KOYKKA,
EDWIN A. HOWE,
QUENTIN ALEXANDER,
1144 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for Petitioner.

Sept. 5, 1956.

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FRANK M. BRENNAN,
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and

RICHARD C. WERNER,
Administrator of Estate of Leslie R. Monroe,
Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Earl Warren, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in cause No. 12,640, wherein that court affirmed the judgment of the United States District Court for the Northern District of Ohio, dismissing the complaint for want of federal jurisdiction.

OPINIONS BELOW.

The opinion of the United States District Court, Judge Connell (Appendix, p. 14) has not been reported; the

opinion of the United States Court of Appeals for the Sixth Circuit, Judges Simons, Allen and Martin (Appendix, p. 18), is reported in 232 F. 2d 884.

JURISDICTION.

The judgment is dated and was entered April 20, 1956; timely petition for rehearing was denied June 11, 1956.

This Court has jurisdiction to review upon certiorari under 28 U. S. C. § 1254(1) upon petition filed within the 90 days prescribed by 28 U. S. C. §2101(c).

QUESTION PRESENTED.

This case presents the question:

Whether a federal court lacks jurisdiction of a complaint, alleging denial of equal protection and the requisite jurisdictional amount, on the ground that the action could have been brought in state court.

CONSTITUTIONS AND STATUTES INVOLVED.

The Fourteenth Amendment to the Constitution of the United States, § 1, says:

"No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

28 U. S. C. A. § 1331 says:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The Constitution of the State of Ohio, Article XII, § 2, says:

"Land and improvements thereon shall be taxed by uniform rule according to value."

Ohio Revised Code § 2723.01 says:

"Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected."

STATEMENT OF CASE.

This is an action to recover Ohio real estate taxes collected from petitioner in violation of its federally protected right to equal protection. The amount sought to be recovered is $200,777.88.

—Constitutional Right Claimed.

Petitioner, owner of an office building in downtown Cleveland, alleged that the taxing authorities of Cuyahoga County, Ohio, had systematically and intentionally assessed downtown commercial properties, including petitioner's, for real estate tax purposes, at 100% of value and other real estate at 50% of value. This, the complaint alleged, denied equal protection because the Ohio Constitution requires all real property to be assessed on the same basis, without discrimination among taxpayers or between types or classes of real estate.

—District Court's Ruling.

The District Court (Judge Connell of the Northern District of Ohio) dismissed the complaint on motion, without trial, on the ground (Appendix, p. 17):

"no federal question is herein presented and consequently the court lacks jurisdiction."

The District Court concluded it was without jurisdiction because in its view Ohio law (Appendix, p. 15):

> "permits classification for the purposes of real estate taxation * * *."

—Affirmed on Different Ground.

The Court of Appeals (Judges Simons, Allen and Martin) did not accept the ground on which the District Court dismissed. (The District Judge was clearly wrong because it is, and for more than 100 years has been, law in Ohio that all real estate must be taxed on the same basis of value.[1]) The Court of Appeals affirmed on a different ground—equally wrong. It held "the district court lacks jurisdiction" because (Appendix, p. 18):

> "Ohio law provides a full, complete and adequate remedy to the appellant in the state courts."

The Court of Appeals reasoned (Appendix, p. 18):

> "The courts of Ohio are open to appellant to contest the alleged unlawful discrimination under Ohio taxing statutes; and, in the event that the highest court of Ohio should decide against it, appellant has the right to appeal to the Supreme Court of the United States upon an allegation that the Fourteenth Amendment to the Federal Constitution has been violated."

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[1] This is the requirement of the Ohio Constitution; the Supreme Court of Ohio has uniformly so ruled. For example, in *McCurdy v. Prugh* (1899), 59 O. S. 465, 55 N. E. 154, the Ohio Supreme Court held the Ohio Constitution forbids (p. 470) "taxing one class of property by one rule and another class by another rule." To the same effect are: *Exchange Bank of Columbus v. Hines* (1853), 3 O. S. 1; *Hill v. Higdon* (1855), 5 O. S. 243, 67 Am. Dec. 289; *The City of Zanesville v. Richards* (1855), 5 O. S. 589; *State, ex rel. Struble v. Davis* (1937), 132 O. S. 555, 9 N. E. 2d 684; *The Standard Oil Co. v. Zangerle* (1943), 141 O. S. 505, 49 N. E. 2d 406; *Zangerle v. Republic Steel Corp.* (1945), 144 O. S. 529, 60 N. E. 2d 170; *City of Cleveland v. Board of Tax Appeals* (1950), 153 O. S. 97, 91 N. E. 2d 480.

The decision works havoc on the judicial process.

Two of the Ohio statutes which the Court of Appeals said give (Appendix, p. 18) "adequate remedy to the appellant," namely Ohio Revised Code § 5717.09 and § 2723.06, do not even exist.

There are no such statutes.

There never have been.

BASIS OF JURISDICTION BELOW.

The District Court's jurisdiction was invoked to protect petitioner's claim to equal protection under 28 U. S. C. § 1331, which gives to the District Court jurisdiction:

> "of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000 * * * and arises under the Constitution * * * of the United States."

REASONS FOR ALLOWANCE OF WRIT.

This case presents an important question of federal jurisdiction.

And of profound concern to the law is the way in which decision below was reached.

The case also has startling ramifications. If a litigant in an action for a money judgment—such as this—of which the federal court otherwise has jurisdiction may be turned from the federal court on the ground he could have sued in state court, a novel tool of federal jurisdiction has been invented. It would, for example, abolish federal diversity jurisdiction for in every such case the litigant could have brought his suit in state court.

The decision shows that this Court's cases have gone unread and unheeded.

The case needs this Court's attention because:

I. JUDGMENT BELOW IS IN CONFLICT WITH THIS COURT'S DECISIONS SUSTAINING JURISDICTION IN CASES OF THIS TYPE.

In view of this Court's decisions, upholding federal jurisdiction in cases of this type,[2] the judgment below is explainable only on grounds of a complete breakdown in the judicial process in the Sixth Circuit.

II. JUDGMENT BELOW IS ALSO IN CONFLICT WITH STATE LAW ON SCOPE OF STATE REMEDY.

Ohio provides an administrative remedy from which review lies to the Supreme Court of Ohio.

But that remedy does not permit the issue of discrimination, of which petitioner complains, to be raised.

1. State Remedy Reaches "True Value" Only and Not Issue of Discrimination.

The Ohio Supreme Court has held that the only question a taxpayer may raise in the state-provided administrative proceedings, and the only question the Court will review upon appeal from those procedings, is whether the taxpayer's property has been assessed in excess of its "true value in money" and not the question of discrimination which this case presents. *American Steel & Wire Co. v. Board of Revision of Cuyahoga County* (1942), 139 O. S. 388, 40 N. E. 2d 426; *Rollman & Sons Co. v. Board of Revision of Hamilton County* (1955), 163 O. S. 363,

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[2] The landmark cases in this Court are: *Township of Hillsborough v. Cromwell* (1946), 326 U. S. 620; *Cumberland Coal Co. v. Board of Revision* (1931), 284 U. S. 23; *Iowa-Des Moines National Bank v. Bennett* (1931), 284 U. S. 239; *Sioux City Bridge Company v. Dakota County* (1923), 260 U. S. 441; *Greene v. Louisville & Interurban Railroad Company* (1917), 244 U. S. 499; *Cummings v. National Bank* (1879), 101 U. S. 153.

127 N. E. 2d 1. For example, in *Rollman* the Ohio Supreme Court ruled (p. 365):

> "The fact that others may have property which is valued at less than its true value in money is not a denial of equal protection to the appellant because of the rights available to it under Section 5609, General Code [now Revised Code § 5715.19], which provides for filing a complaint as to undervaluations of the property of others and therefore is not an issue which may be raised by the appellant in this case."

This is no remedy because, as this Court ruled in *Township of Hillsborough v. Cromwell* (1946), 326 U. S. 620—and as this Court has repeatedly held—the demand of the Federal Constitution (p. 623):

> "is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class."

Federal courts sitting in Ohio, it may be noted, have uniformly held that the only remedy the Ohio administrative procedures provide is to determine "true value in money" and that the issue of discrimination cannot there be raised.[3]

For this very reason federal jurisdiction has been sustained. In *The Montana National Bank of Billings v. Yel-*

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[3] See: *City Ry. Co. v. Beard* (S. D. Ohio, 1922), 283 F. 313, 323; *Western Union Telegraph Co. v. Tax Commission of Ohio* (S. D. Ohio, 1927), 21 F 2d 355, 358-9; *Ohio Fuel Supply Co. v. Paxton* (S. D. Ohio, 1924), 1 F. 2d 662, 663-664, affirmed (6 C. A., 1926), 11 F. 2d 740, 741; *Connecting Gas Co. v. Imes* (S. D. Ohio, 1926), 11 F. 2d 191, 193-4; *Conn v. Ringer* (6 C. A., 1929), 32 F. 2d 639, 644. For example, in *Western Union* the court pointed out that in the state tribunals (21 F. 2d at 360) "complainants cannot raise the constitutional question of a discriminatory assessment, but may only complain of an assessment in excess of the actual value of the property in money."

lowstone County of Montana (1928), 276 U. S. 499, for example, when it was argued (p. 505) "that plaintiff in error may not maintain this action because of its failure to apply to the county board of equalization for an administrative remedy," this Court replied (p. 505):

> "the short answer is that the decision of the Supreme Court of Montana in the *Rogers* case would have rendered any such application utterly futile since the county board of equalization was powerless to grant any appropriate relief in the face of that conclusive decision."

—(a) State Tribunal Has Ruled Petitioner Without Remedy.

Petitioner, as the Court of Appeals noted, brought an administratve proceeding involving the same tax-year as is here in question. But, in that proceeding the Ohio Board of Tax Appeals held it could not aid petitioner because the Board's jurisdiction is limited to the determination of the "true value in money" of the property in question.[4] (See Appendix, pp. 20, 22.)

Thus, the remedy the Court of Appeals held "adequate" the state tribunal, in this very case, held nonexistent.

—(b) Even If State Law in Doubt Federal Court Could Not Refuse Jurisdiction.

Even if Ohio law were in doubt—as it is not—the federal court would have had no right to dismiss this case. Only four weeks before this case was decided, this Court, in

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[4] The administrative proceeding had not been completed when this action was brought. The statute, Ohio Revised Code § 2723.01, permitting the filing of this action required the action to be brought "within one year after the taxes * * * are collected." Petitioner, therefore, had to bring the action when it did or be forever barred.

Doud v. Hodge (1956), 350 U. S. 485, ruled that a federal court may not dismiss for want of jurisdiction on the ground state law, on which the case turns, has not been passed upon by the state court. It follows *a fortiori* that a federal court may not dismiss where, as here, the state law *has* been passed on by the state court and is no longer unsettled or uncertain.

2. Court Below Was Also Wrong in Ruling State Decision Could Be Reviewed Here.

The Court of Appeals was also wrong in holding that petitioner's right to equal protection, if denied by the Ohio Supreme Court sitting in review on the administrative process, would be protected by appeal to this Court.

This Court's cases are to the contrary.

Since the Ohio administrative remedy permits raising only the issue of "true value in money" and not the constitutional question of discrimination, petitioner could not appeal such case from the Supreme Court of Ohio to this Court. The judgment then would rest upon an adequate state ground and would not be eligible for review here.[5] In *Covey v. Town of Somers* (1956), 351 U. S. 141, decided two weeks after the judgment below issued, this Court noted (p. 144):

> "Manifestly, no constitutional question could have been reached if the [New York State] Court of Appeals had been of the opinion that the appellant had pursued the wrong remedy."

The remedy the Sixth Circuit in this case told petitioner it should pursue, does not exist.

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[5] See: *Parker v. Illinois* (1948), 333 U. S. 571, 573-575; *Ellis v. Dixon* (1955), 349 U. S. 458, 462, Note 5; *Central Union Telephone Co. v. City of Edwardsville* (1925), 269 U. S. 190, 195.

III. JUDGMENT BELOW HOLDING FEDERAL COURT LACKS JURISDICTION TO ENFORCE STATE-CREATED RIGHT IS IN CONFLICT WITH THIS COURT'S DECISIONS.

Apart from the administrative proceeding above considered, Ohio, by Ohio Revised Code § 2723.01, has authorized suit to recover taxes illegally collected.

But the Court of Appeals held petitioner may enforce that state-created right only in state court.

This Court's cases hold the other way:

1. State-Created Right May Be Enforced by Federal Court.

The state having created the right, petitioner may enforce it either in state court, or, if federal jurisdiction exists as it does here by reason of the presence of the constitutional question, in federal court.[6]

On the very issue which here arises, this Court, in *Chicago, Burlington & Quincy Railroad Company v. Osborne* (1924), 265 U. S. 14, ruled (p. 16):

> "If an action to recover the payment were allowed [as it is here under Ohio Revised Code § 2723.01], the suit might be brought in the Courts of the United States, under the usual conditions, as well as in those of the State."

The choice of forum is a "right." *Railroad and Warehouse Commission of Minnesota v. Duluth Street Railway Company* (1927), 273 U. S. 625. This Court said (p. 628):

> "plaintiff if it prefers to entrust the final decision to the Courts of the United States rather than to those of the State has a right to do so."

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[6] The only restriction on the right to pursue remedies in either court is that imposed by the Johnson Act, 28 U. S. C. § 1341, which applies to suits to enjoin collection—and not to suits to recover taxes paid—and is inapplicable here.

Congress having made the District Court available, the Court of Appeals had no right to legislate away the jurisdiction the Congress said the District Court "shall have." As this Court pointed out in *Baltimore Contractors, Inc. v. Bodinger* (1955), 348 U. S. 176, 181:

> "It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system."

—(a) State May Not Confine Remedy to State Court.

The statute, to be sure (Ohio Revised Code § 2723.01), says "Courts of common pleas" may entertain such actions.

But, as this Court's cases show, that does not deprive the federal court of jurisdiction. It was so ruled in:

Railway Company v. Whitton's Administrator (1871), 80 U. S. 270, where this Court said (p. 286) "In all cases, where a general right is thus conferred, it can be enforced in any Federal court within the State having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of State legislation that it shall only be enforced in a State court."

Cowley v. Northern Pacific Railroad Company (1895), 159 U. S. 569, where this Court said (p. 582) "Although the statute of a State or Territory may not restrict or limit the equitable jurisdiction of the Federal courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the Federal courts may enforce on their equity or admiralty side, precisely as they may enforce a new right of action given by statute upon their common law side."

—(b) Statute in Question Has Uniformly Been Enforced by Federal Courts.

The very statute which authorizes this suit, Ohio Revised Code § 2723.01 (formerly Ohio General Code § 12075, and before that Ohio Revised Statutes § 5848), but which the Court of Appeals held confines petitioner to the state remedy, has been enforced by this Court.

In *Cummings v. National Bank* (1879), 101 U. S. 153, for example, speaking of the present statute (which then was Ohio Revised Statutes, § 5848, enacted April 10, 1856, 53 Ohio Laws 178) and which then as now gave the taxpayer the right to sue in "the courts of common pleas," this Court said (p. 157):

> "where a statute of a State created a new right or provided a new remedy, the Federal courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires."

Norwood v. Baker (1898), 172 U. S. 269, 292, is to the same effect.

Federal courts in Ohio have repeatedly enforced the statute.[7]

2. Court Does Not Lose Jurisdiction Because State Law Also Involved.

The fact that ultimate decision turns also on state law—in this case the right to equal taxation guaranteed to petitioner by the Ohio Constitution—does not defeat federal jurisdiction. *Doud v. Hodge* (1956), 350 U. S.

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[7] See: *Grether v. Wright* (6 C. A. 1896), 75 F. 742, 744-751; *Lander v. Mercantile Nat. Bank of Cleveland* (6 C. A., 1902), 118 F. 785, 791; *Conn v. Ringer* (6 C. A., 1929), 32 F. 2d 639, 644; *Ohio Fuel Supply Co. v. Paxton* (S. D. Ohio, 1924), 1 F. 2d 662, 666, affirmed (6 C. A.), 11 F. 2d 740; *Meyers v. Shields* (N. D. Ohio, 1894), 61 F. 713, 716; *City Ry. Co. v. Beard* (S. D. Ohio, 1922), 283 F. 313, 323-325; *Connecting Gas Co. v. Imes* (S. D. Ohio, 1926), 11 F. 2d 191, 194-195.

485; *Markham v. Allen* (1946), 326 U. S. 490. In *Markham* this Court ruled (p. 495):

> "The mere fact that the district court, in the exercise of the jurisdiction which Congress has conferred upon it, is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner."

The Court of Appeals, therefore, was wrong in closing the door of the federal court.

IV. COURT BELOW HAS SO FAR DEPARTED FROM USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioner brought this suit in reliance upon the decisions of this Court.

The Court of Appeals, unmindful of the law this Court has declared, has left petitioner remediless for a constitutionally protected right.

Such inattention to this Court's decisions calls for the exercise of this Court's supervisory power.

CONCLUSION.

The writ should issue.

Respectfully submitted,

THOMAS V. KOYKKA,
EDWIN A. HOWE,
QUENTIN ALEXANDER,
1144 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for Petitioner.

Sept. 5, 1956.

APPENDIX.

OPINION OF DISTRICT COURT.

(Filed June 24, 1955.)

CONNELL, J.:

This action was brought to Federal Court under Title 28, Section 1331, U. S. Code and is the result of a protest against the Ohio real estate tax assessment on Plaintiff's property at an alleged percentage of its fair market value substantially higher than is assessed against other real property within Cuyahoga County. The assessment is attacked as being violative of the Fourteenth Amendment of the United States Constitution in denying the Plaintiff equal protection of, and in the taking of his property without, due process of law. Plaintiff states that it has exhausted all effective administrative remedies available to it under the laws of the State of Ohio.

Although the plaintiff has stated that it has exhausted all effective administrative remedies available to it under the laws of the state of Ohio, that is true only in so far as it relates to his claim of discrimination on the federal question. On other questions, the plaintiff has pursued and is still pursuing certain effective administrative remedies under the Ohio procedural steps providing for the contest of real estate assessments, such as (a) an appeal (from the County Board of Revision) to the Board of Tax Appeals (under G. C. 5717.03) from whose decision an appeal as of right may later be taken to the Supreme Court of Ohio (under G. C. 5717.04), and in the alternate, (b) an appeal to the Court of Common Pleas (under G. C. 5717.05) which thereafter may be taken to the Court of Appeals and, on motion to certify, the Supreme Court of Ohio. It would seem that these remedies should have been exhausted before appealing to this court on the federal

question to the effect that plaintiff is here discriminated against.

However plaintiff here presents the federal question which has been met by the defendant in the form of a motion to dismiss, which motion squarely meets same under (b) as follows: that (a) the State statutory proceedings have not been completely exhausted; (b) the Federal Court lacks jurisdiction; and (c) that the complaint fails to state a claim against the defendant upon which relief can be granted.

The Ohio Statute on the subject (5713.01) is quite decisive of the Federal question; it relates as follows:

> "The auditor shall assess all the real estate situated in the county at its true value in money. * * * He may increase or decrease the value of each lot or parcel of real estate in any township, municipal corporation, or other taxing district by an amount which will place all real property on the tax list at its true value in money, or he may increase or decrease the aggregate value of the real property, or any *class* of real property, in the county, township, municipal corporation, or other taxing district, or in any ward or other division of a municipal corporation by a percent or amount which will place such property on the tax list at its true value in money, so that every *class* of real property shall be listed and valued for taxation by an equal and uniform rule." (Emphasis supplied [by the District Court].)

This section enacted by the Ohio Legislature permits classification for the purposes of real estate taxation and the exercise of such right is not forbidden by the Federal constitutional requirement that taxation be uniform and equal. Action in this regard will not be set aside by the Courts unless the classification attempted results in such discrimination against members of the same class as to deny them

the equal protection of the law. Plaintiff makes no such claim here.

The plaintiff herein admits that his property has been assessed on the same basis and at the same percentage of actual value as all other office buildings, commercial and industrial property generally have been assessed. The basis for plaintiff's claim of discrimination lies in the fact that other real property, presumably domestic, has been assessed at a much lower percentage of actual value. We find no discrimination in the mere fact that domestic property may be assessed for taxation at approximately fifty percent of its actual value while commercial and industrial property within the same county is assessed at a considerably higher percentage of true value. We do not find that such differentiation constitutes discrimination as the plaintiff claims; we do not find that plaintiff has been denied any rights under the Fourteenth Amendment to the U. S. Constitution, merely because of such differentiation, because plaintiff is assessed as are others of its class.

Illustrative of the cases cited by the plaintiff in support of his contention that a federal question is herein presented is the case of *Township of Hillsborough v. Cromwell* (1946), 326 U. S. 620. There the Supreme Court pointed out (p. 623):

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on *others of the same class*. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of the other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a state does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes

of other members of the class." (Emphasis supplied [by the District Court].)

This decision indicates quite clearly that unless there is an allegation of discrimination within a class or an attack on the validity of the classification itself, there is no denial of equal protection and hence, no presentation of a "federal question."

Plaintiff indirectly suggests that the several hundred thousand owners of the small homes of Cuyahoga County who for many decades have been assessed at a lesser rate, ought to have been assessed at the same percentage of actual value as has applied to downtown office buildings. Plaintiff really contends that the taxing authorities have had no right, to do as they have done for many decades, to assess homes at a lower percentage of actual value, than other properties. We find no discrimination therein. Some states exempt homes in large part.

In the present instance, there has been no attack upon the validity of the classification of property in Cuyahoga County for the purposes of Ohio real estate taxation. Furthermore, no allegation of discrimination within a class has been advanced. Therefore, it is the conclusion of this court that no federal question is herein presented and consequently the court lacks jurisdiction. The motion of the defendant to dismiss the complaint should therefore be granted.

/s/ JAMES C. CONNELL,
United States District Judge.

June 24, 1955.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

232 F. 2d 884.

(Filed April 20, 1956.)

Before SIMONS, Chief Judge; ALLEN and MARTIN, Circuit Judges.

PER CURIAM. In this action, brought in the United States District Court for the Northern District of Ohio, Union Properties, Inc., challenged, as violative of the Fourteenth Amendment, the assessment of certain of its downtown real estate in Cuyahoga County at a substantially higher percentage of its actual value than was the assessment in that county of differently classified real estate—such as residential property—at less than fifty per cent of its actual value.

On motion, the complaint was dismissed for the reason that, no federal question being presented, the United States District Court lacked jurisdiction of the action.

It is quite apparent that, here, Ohio law provides a full, complete and adequate remedy to the appellant in the state courts. Indeed, before the present action was filed, appellant had instituted a complaint pursuant to section 5715.19 of the Revised Code of Ohio. For Ohio procedure, see, sections 5715.21; 5715.22; 5717.01; 5717.03; 5717.05; 5717.09, Revised Code of Ohio. By section 2723.01 of the Revised Code, the Courts of Common Pleas of Ohio may enjoin the illegal levy or collection of taxes and assessments, and may entertain actions to recover such taxes, when collected. See, further, sections 2723.03-2723.06.

The courts of Ohio are open to appellant to contest the alleged unlawful discrimination under Ohio taxing statutes; and, in the event that the highest court of Ohio

should decide against it, appellant has the right to appeal to the Supreme Court of the United States upon an allegation that the Fourteenth Amendment to the Federal Constitution has been violated.

In the posture of the case as presented, we think United States District Judge Connell correctly ruled that the district court lacks jurisdiction.

The judgment is affirmed.

JUDGMENT.

(Filed April 20, 1956.)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

ORDER DENYING REHEARING.

(Filed June 11, 1956.)

The petition for rehearing is denied.

OPINION OF OHIO BOARD OF TAX APPEALS.

CASE No. 27741.

BEFORE THE BOARD OF TAX APPPEALS

DEPARTMENT OF TAXATION,

STATE OF OHIO.

UNION PROPERTIES, INC.,

Appellant,

vs.

CUYAHOGA COUNTY BOARD OF REVISION,

Appellee.

ENTRY.

(Nov. 23, 1955.)

This cause and matter came on to be considered by the Board of Tax Appeals upon an appeal filed herein under date of December 16, 1954 by the appellant above named from a final order of the Cuyahoga County Board of Revision dated November 18, 1954, in and by which final order said Board of Revision, acting upon a complaint duly filed by appellant under the provisions of Revised Code Section 5715.19, adopted and approved the Cuyahoga County Auditor's assessed valuation of certain real property owned by the appellant for the tax year 1952; and thus said Board of Revision determined the true value in money of said property for said tax year to be the same as that ascribed to it by the county auditor.

The real property involved herein is situated in the Cleveland City taxing district, Cuyahoga County, Ohio, and is described on the auditor's records as being Permanent Parcels number 101-36-1, 101-36-2, 101-36-13 and

101-36-10. The appellant owns the fee in the first three parcels and is lessee under a 99 year lease, renewable forever, of the last named parcel. All of the parcels are contiguous and constitute an economic unit located at the northeast corner of Euclid Avenue and East 9th Street, extending back to Chester Avenue. The property has a frontage of 145.74 feet on Euclid Avenue extending back along East 9th Street to Chester Avenue, where the property has a frontage of 516.41 feet.

Both the county auditor and the Board of Revision ascertained and determined that the true value in money of the real property in question for the tax year 1952 was as follows:

Land	$ 2,493,310
Building	11,007,890
Total	$13,501,200

In its notice of appeal, as filed with the Board of Tax Appeals, the appellant says that the true value in money of the subject property for the tax year 1952 was, and is, as follows:

Land	$1,350,000
Building	5,757,000
Total	$7,107,000

The cause was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript furnished by the Cuyahoga County Board of Revision, and the evidence and exhibits presented at a hearing before the Chairman of the Board of Tax Appeals in Cleveland, Ohio, starting June 23, 1955. The parties also filed briefs in support of their views.

The appeal in this case is a statutory appeal and this Board is given jurisdiction and authority to decide it under

the provisions of Revised Code section 5717.03, the pertinent portion of which section reads as follows:

> "In the case of an appeal from a decision of a county board of revision the board of tax appeals shall determine the true value in money of the property whose valuation or assessment by the county board of revision is complained of, * * *."

In other words the sole issue before the Board of Tax Appeals may be stated as follows:

> *What was the true value in money of appellant's real property for the tax year 1952?*

And in arriving at an answer to this question we must keep in mind the statements found in recent opinions of the Supreme Court of Ohio.

In the case of *B. F. Keith v. Board of Revision of Franklin County,* 148 Ohio State 253, the Court adopted as Syllabus No. 1, the following language:

> "In determining the value of property for the purpose of taxation, the assessing body must take into consideration all factors which affect the value of the property."

In the case of *Neil House Hotel Company v. Board of Revision of Franklin County,* 147 Ohio State 231, 235, Judge Turner, in writing the opinion affirming the valuation placed on the Neil House by the Board of Tax Appeals, quoted this language used by the Board:

> "It is well settled that the earning capacity of real estate may be considered in fixing its value for taxation * * *."

In the case of *Hibschman v. Board of Tax Appeals,* 142 Ohio State 47, the Supreme Court, in a per curiam opinion, used this language:

> "When considering net income as a factor in establishing the true value of income producing property,

operating expenses estimated by a witness need not be given the same weight as actual expenses. Liquidation or distress sales of neighboring and comparable properties are not persuasive in fixing the true value in money."

In the case of *Ramsey v. County Board of Revision of Franklin County,* 141 Ohio State at page 366, the Supreme Court, in a per curiam opinion, used this language:

"The price paid by the appellant is not a controlling factor in determining the assessed valuation of the property on the tax duplicate. While it is shown by the record that this sale was not a forced sale but one which was consummated after a general offering of the land to the public, this is but one of the factors to be considered."

In the case of the *Citizens Building Company v. Board of Revision of Cuyahoga County,* 141 Ohio State at page 47, the Supreme Court, in a per curiam opinion, used this language:

"Many facts were adduced in evidence which had a bearing upon the value of the property, such as depreciation, obsolescence, reproduction cost, condition, present and future usefulness and rental income of the building involved and of other like buildings in the vicinity, the location of the property and trends with respect to economic values and pedestrian traffic."

In the case of the *American Steel and Wire Company v. Board of Revision of Cuyahoga County,* 139 Ohio State 389, the Supreme Court, in a per curiam opinion, used this language:

"It is suggested in the brief of the board of revision that there are three methods of valuing real estate, namely, (1) the reproduction cost less depreciation or 'physical' method, (2) the comparative sales of

similar property or 'market value' method and (3) the 'economic' or capitalized income method.

"With respect to these methods it should be observed that, while reproduction cost, depreciation, opinions as to market value, and income may be given proper consideration, true value is a question of fact to be determined by the taxing authorities. * * *.

"A great deal is said by the board of revision about uniformity; but it should be remembered that the fixing of the true value of each lot or tract with improvements thereon is a separate proceeding and does not involve the consideration of all the parcels of land within a given area at the same time. When determinations as to the true value are reached by the taxing authorities as to each tract or lot of land and improvements thereon throughout a taxing district, though in separate inquiries or proceedings, taxation based upon valuations so fixed is essentially by uniform rule within the meaning of the Constitution and statutes. *In other words if the true value of each parcel of real estate is fixed separately then there is such uniformity between all parcels as is required by law.*

"Legal requirements are not satisfied by a uniform over-valuation or under-valuation in a particular taxing district or even in the whole state. Every owner of real property is entitled to have his land and the improvements thereon taxed at the true value in money so that the one per cent clause of the Constitution will operate justly as to him as well as other taxpayers and a uniform over-valuation or under-valuation of all real property and improvements thereon in a taxing district would be a violation of the constitutional provision.

"In determining the value of land or the improvements thereon all the facts and circumstances relating to the nature of the property, its availability for the purpose for which it was constructed or for any other purpose for which it may be used, its obsolete char-

acter, if such it has, and every other factor that tends to prove the true value in money of the land and the improvements thereon, and evidence of facts occurring after as well as before the tax lien day of the year involved within reasonable limitations are admissible."

The building, located on the L shaped land, is a 20-story office type structure commonly known in Cleveland, Ohio, as the Uunion Commerce Building, with an additional partial floor subsequently built on the roof to house the Mid-Day Club. Adjacent to the main building on the north, or Chester Avenue side, is a 5 story annex which is physically a part of the main building. The building lines are contiguous with the lot lines except for a driveway 16.5 feet wide, at the easterly line, and the vacant service area at the rear. The service area, including the property held under the 99 year lease measures 32 feet by 132 feet.

Construction of the building was started in 1922 and the first tenant was housed in the building in the autumn of 1923. By mid-year of 1924 all construction had been completed.

The land, including all structures then on the property was acquired in 1922 at a cost of $3,764,000. The original cost of the building, including the annex and likewise including the demolition cost of the building on the site was $13,377,754.

The property was purchased by its present owner on June 14, 1949 for $14,214,000, which purchase price was $10,000 more than was offered by the only other bidder, one John Galbreath. Prior to this sale, and for the purpose of determining a fair value thereof, the property has been appraised by three independent groups as follows:

(1) Elmer Lindseth, President of the Cleveland Electric Illuminating Company; Alva Bradley, Real Estate Manager and Owner of downtown prop-

erty; Elwood Fisher, President of Fisher Brothers Company ---------- $13,000,000.

(2) E. J. Sheridan Company of Chicago, Illinois, Real Estate Appraisers ---------- $13,500,000.

(3) Ostendorf-Morris Company of Cleveland, Ohio, Real Estate Appraisers ---------- $13,800,000.

The appellant offered as a witness Mr. Harry E. Wells, President and General Manager of Union Properties, Inc., who described the property and furnished data relative to income and expenses in the operation of the building.

The appellant also offered an expert witness, Mr. Edgar Ostendorf, who testified at length concerning the valuation of the property by his company in 1949 and who also testified that in his opinion the fair market value of the property on tax lien date, 1952 was $13,800,000, which figure included about $100,000 in personal property.

The appellee offered two expert witnesses who had been hired by the Cuyahoga County Board of Revision for the express purpose of appraising the property in order to testify at the hearing. Mr. Lawrence E. Smith and Mr. Roy C. Carpenter worked together on the project and the main testimony was offered by Mr. Smith, who testified as to their appraisal of the property using a physical, summation and economic approach. In the final opinion of these witnesses the market value of this property on tax lien date in 1952 was $21,000,000, broken down as follows:

Land	$ 3,600,000
Building	17,400,000

The record in this case fails to disclose any credible evidence that the true value in money of this property for the year 1952 is the amount claimed by appellant, to wit, $7,107,000. The evidence seems to indicate that if a conservative approach is used and a consideration is given to all factors which affect value, the figure adopted by the

Cuyahoga County Board of Revision is as close as possible to being the figure which is the true value in money of the property for the tax year 1952. It appears to us that if any other figure was adopted by the Board on the basis of the evidence contained in the record, we would be indulging in speculation.

Coming now to dispose of this case and taking into consideration all the factors involved, we find and determine that the true value in money of the real property here under consideration for the tax year 1952, was, and is:

Land	$ 2,493,310
Building	11,007,890
Total	$13,501,200

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

EARL H. MAURER,
Secretary.

[SEAL]

Office - Supreme Co U.S
FILED
OCT 24 1956
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 392.

UNION PROPERTIES, INC.,

Petitioner,

vs.

FRANK M. BRENNAN,
Successor Treasurer of Cuyahoga County,
and
RICHARD C. WERNER,
Administrator of Estate of Leslie R. Monroe,
Deceased,

Respondents.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

FRANK T. CULLITAN,
Prosecuting Attorney of Cuyahoga County,
SAUL S. DANACEAU,
Assistant Prosecuting Attorney,
SHELDON CLARK,
Assistant Prosecuting Attorney,
Criminal Courts Bldg.,
Cleveland 14, Ohio,
Attorneys for Respondent County Treasurer.

October 25, 1956.

(Other Counsel on Inside Front Cover.)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8647

THOMAS V. KOYKKA,
EDWIN A. HOWE,
QUENTIN ALEXANDER,
1144 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 392.

UNION PROPERTIES, INC.,

Petitioner,

vs.

FRANK M. BRENNAN,
Successor Treasurer of Cuyahoga County,
and
RICHARD C. WERNER,
Administrator of Estate of Leslie R. Monroe,
Deceased,

Respondents.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

To the Honorable Earl Warren, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

QUESTION PRESENTED.

Respondent cannot adopt the question as presented by the petitioner because that question was neither involved nor presented before, nor decided by, the federal courts below in this case.

The question presented on petition for certiorari we submit is:

Did the Federal District Court have jurisdiction to determine the valuation of petitioner's real estate, the

comparative over-assessment, if any, and order the recovery of taxes already paid when there was pending a state statutory proceeding, voluntarily instituted by the petitioner, as a complaint to the valuation and assessment of such real estate with the right of review and appeal to the courts?

The district and circuit courts said no. We agree.

Implicit in this question and in the opinion of the U. S. Court of Appeals are these questions:

1. Does Ohio law fail to provide a full, complete and adequate remedy to the petitioner in the state courts?

2. Does a complaint that commercial real estate has been classified distinct from residence property for purposes of taxation, permitted by the United States Constitution, but purportedly prohibited by the Constitution of the State of Ohio, present a federal question?

The district and appellate courts below answered both of these questions no. We agree.

STATEMENT OF THE CASE.

On September 1, 1954 appellant (petitioner here) filed in the District Court this action to recover monies paid voluntarily as taxes under written protest, claiming that real estate in Cuyahoga County as a whole had been valued and assessed for the year 1952 at not more than fifty percent of its actual value, but that real estate used for commercial purposes, such as appellant's property, was valued and assessed at a substantially higher percentage of actual value; and appellant seeks to recover the sum it has determined to be the excess amount so paid

as an allegedly illegal and unconstitutional assessment. (Appendix 1a and 2a of appellant's brief in Court of Appeals, filed on certiorari as part of record.)

Previously, on April 23, 1953, Union Properties, Inc. had filed a complaint before the Board of Revision of Cuyahoga County, Ohio, concerning the 1952 tax valuation and assessment of the same property. This complaint so voluntarily instituted by appellant was still pending before the said board of revision at the time it filed a suit in federal court (appellant's appendix 6a). Thereafter, after a full hearing the board of revision on November 18, 1954 denied the complaint. The appellant on December 16, 1954 appealed said cause to the Board of Tax Appeals of the State of Ohio.

On January 13, 1955 appellee (respondent here) filed in the District Court a motion to dismiss the complaint of Union Properties, Inc. (appellant's appendix 1a) as follows:

1. To dismiss the action for the reason that at the time of the filing thereof there was pending, and at all times since there has been pending, a statutory proceeding authorized under the laws of the State of Ohio before the Board of Revision of Cuyahoga County, Ohio, instituted by plaintiff as a complaint as to the valuation and assessment of the real property described in this action, with the right for review and appeal to the courts, all of which more clearly appears in the affidavit hereto annexed as Exhibit A and made a part hereof in support of paragraphs 1, 2 and 3 of this motion, and said statutory proceeding affords plaintiff a full, complete and adequate remedy.

2. To dismiss the action on the ground that the Court lacks jurisdiction.

3. To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

The District Court granted the said motion and on June 27, 1955 dismissed the complaint, saying the taxpayer was "still pursuing certain effective administrative remedies under the Ohio" law. (Record, appellant's appendix 2a and 7a.)

Although the U. S. District Court had entered judgment June 27, 1955 that the federal courts lacked jurisdiction, Union Properties, Inc. thereafter chose to abandon state proceedings. Specifically, it failed to appeal a ruling of the Ohio Board of Tax Appeals of November 23, 1955. The ruling found the property correctly valued at $13,501,200 and affirmed the county board of revision (Pet. cert. 20).[1] The taxpayer did not take advantage of R. C. 5717.04, which authorizes an appeal from the Ohio Board of Tax Appeals' decision to the supreme court of the state or to the court of appeals for the county in which the real estate lays, or in which the taxpayer resides. (At no time did Union Properties, Inc. pursue the remedy provided by R. C. 5717.05, being an appeal from the board of revision to the court of common pleas.)

Instead Union Properties, Inc. chose to appeal the district court's finding of no federal jurisdiction to the U. S. Court of Appeals for the Sixth Circuit. April 20, 1956 that court affirmed the judgment of the district court, and rehearing was denied June 11, 1956.

---

[1] We refer to the decision of the Ohio Board of Tax Appeals because Petitioner included its text in the Appendix (Pet. 20), although it is not part of the record in this case. We note page 20 in the Board's opinion the comment that expert witnesses for the appellee testified the property had a market value of $21,000,000. Tax valuation was fixed at $13,501,200.

The Circuit Court did not say, as petitioner's question implies and as its counsel argues in his petition for certiorari (Pet. cert. 5) that existence of jurisdiction by a state court necessarily defeats federal jurisdiction. The short opinion speaks for itself. The appellate court said, "Ohio law provides a full, complete and adequate remedy to the appellant in the state courts." (Pet. cert. 18.) Accordingly, this case is not within that class of cases where federal jurisdiction exists because obviously and patently the state does not provide an adequate remedy.

Inasmuch as nothing in the opinion below asserts that state jurisdiction necessarily defeats federal jurisdiction, it does not avail petitioner here to refute that proposition. We submit a reading of the Circuit Court's opinion will disclose its findings that the courts of Ohio were open to petitioner, that adequate remedies were provided by Ohio laws, that petitioner had instituted a complaint pursuant to R. C. 5715.19 of Ohio, and that:

> "The courts of Ohio are open to appellant to contest the alleged unlawful discrimination under Ohio taxing statutes; and, in the event that the highest court of Ohio should decide against it, appellant has the right to appeal to the Supreme Court of the United States upon an allegation that the Fourteenth Amendment to the Federal Constitution has been violated." (Pet. cert. 18.)

ARGUMENT.

Did the Federal District Court have jurisdiction to determine the valuation of petitioner's real estate, the comparative over-assessment, if any, and order the recovery of taxes already paid when there was pending a state statutory proceeding voluntarily instituted by the petitioner, as a complaint to the valuation and assessment of such real estate with the right of review and appeal to the courts?

1. Does Ohio law fail to provide a full, complete and adequate remedy to the petitioner in the state courts?

Not only did the District Court and the Court of Appeals hold that the Ohio law was adequate (District Court Opinion, Pet. for cert. 14, and Sixth Circuit opinion, Pet. 18), but the United States Supreme Court has previously held that the Ohio tax statutes provide an adequate remedy. This Court passed on this question recently in *Alger v. Peck, Ohio Tax Comm'r,* 74 S. Ct. 605, 98 L. ed. 1148 (1954). Justice Reed concluded this opinion by saying that "Congress under 28 U. S. C. 1341 left the burden on the taxpayer to follow the required state procedure, rather than to determine the alleged Federal issues primarily in the federal courts." 98 L. ed. at 1150.

Union Properties' argument on page 6 of the petition for certiorari that the state remedy reaches only "true value" and not the issue of discrimination in levying the tax was rejected in *Alger v. Peck,* 74 S. Ct. at 607, 98 L. ed. at 1150. Here Justice Reed said:

> "Appellants contend that the Ohio remedy does not conform with that required by sec. 1341 of the Judicial Code and that they will be irreparably harmed if enforcement of the statute is not enjoined pending determination of this appeal. In particular

they argue that the Ohio procedure is not speedy, that it is futile to exhaust the administrative procedures because such bodies cannot pass on constitutional issues * * *.

"The Ohio statutes accord an adequate remedy to appellants which they have not yet exhausted. The fact that such procedures cause inconvenience and expense, and that appellant may eventually prevail are not controlling. In enacting sec. 1341 Congress merely adopted the rule that where orderly procedures for litigating issues have been provided, such procedures must prevail. Cf. Myers v. Bethlehem Shipbuilding Corp., 303 US 41, 82 L. ed. 638, 58 S. Ct. 459; Petroleum Exploration, Inc. v. Public Service Com., 304 US 209, 82 L. ed. 1294, 58 S. Ct. 834. I do not read that section to preclude states from prescribing resort to administrative remedies before court review. This is not a case where the state remedy is unknown or such remedy is unavailable. Cf. Spector Motor Service, Inc. v. O'Connor, 340 US 602, 95 L. ed. 573, 71 S. Ct. 508; Georgia R. & Banking Co. v. Redwine, 342 US 299, 96 L. ed. 335, 72 S. Ct. 321."

The petitioner here had pending at the time of the District Court's ruling which granted our motion to dismiss, its complaint to the Board of Revision of Cuyahoga County, Ohio, under 5715.19 of the Revised Code of Ohio. It reads:

"A complaint against any valuation or assessment which appears upon the tax duplicate of the then current year may be filed on or before the time limited for payment of taxes for the first half year, or at any time during which taxes are received by a county treasurer without penalty for the first half year. Any taxpayer may file such a complaint as to the valuation or assessment of his own or another's real property. * * *

> "* * * Each complaint shall state the amount of *overvaluation,* undervaluation, *or illegal valuation* complained of, and the treasurer may accept any amount tendered as taxes upon property concerning which a complaint is then pending, computed upon the claimed valuation as set forth in the complaint, and if such tender is not accepted no penalty shall be assessed because of the nonpayment thereof. * * *" (Italics added.)

5715.21 R. C. provides that the payment of the tax shall not abate the complaint or appeal.

5715.22 R. C. provides for a credit or repayment of overpaid taxes as a result of the determination of such complaint.

5717.01 R. C. et seq. provides for an appeal from the county board of revision to the board of tax appeals.

5717.05 R. C. authorizes as an alternative to the appeal to the board of tax appeals, an appeal from the decision of the county board of revision to the court of common pleas of the county.

5717.04 R. C. authorizes an appeal from the decision of the board of tax appeals to the supreme court of the state or the court of appeals for the county in which the property taxed is situated or in which the taxpayer resides.

Appellant had thus voluntarily chosen a remedy provided by state law and the proceeding was thus pending before a quasi-judicial body with the right of review and appeal to the courts. By the act of the appellant the state quasi-judicial and judicial bodies had acquired jurisdiction and such state jurisdiction must be exhausted and is exclusive. 26 *R. C. L.* 452, section 408.

An alternative remedy, which petitioner conceded below it had, confers jurisdiction on the courts of common pleas of the state to enjoin the collection of illegal

taxes and assessments and to entertain actions to recover them when collected. See R. C. 2723.01.

The foregoing remedies were cited in the opinion of the Circuit Court. (A clerical error appeared in two of the opinion citations in that 5717.09 should be 5717.06, and 2723.06 should be 2723.05. See Pet. cert. 5 and 18.)

Petitioner was not and could not be denied its rights under the Federal Constitution because it later voluntarily failed to appeal from the adverse decision of the Board of Tax Appeals and so permitted such decision to become final and conclusive as provided by R. C. 5717.03, which reads in part:

> "The decision of the board may affirm, reverse, vacate, or modify the tax assessments, valuation, determinations, findings, computations, or orders complained of in the appeals or applications determined by it, and its decisions shall become final and conclusive for the current year unless reversed, vacated, or modified as provided in section 5717.04 of the Revised Code. * * *"

(R. C. 5717.04 spells out appellate procedure.)

The position of counsel for the appellant that state tribunals disregard constitutional discrimination is not in accord with the position taken by the same counsel in *Lincoln Electric Co. v. Board of Revision of Cuyahoga County, Ohio,* cause No. 23635. There, maintaining that the Ohio "Board is not barred from giving weight to discrimination issue" (appellant's br. for Lincoln Electric 35), *American Steel & Wire Co. v. Board of Revision of Cuyahoga County,* 139 O. S. 388, 40 N. E. 2d 426 (1942) was distinguished. This case is now cited on petition for certiorari as authority ~~that~~ the Ohio courts *cannot* give weight to the discrimination issue (Pet. cert. 6). We could

not distinguish this case better than opposing counsel did in their Lincoln Electric brief at page 36:

> "In that case * * * it was the taxpayer who asserted that, since it had proved true value in money, it had fully satisfied its statutory burden and that it could not be required to go further and prove also that the reduction it sought would not produce inequality and discrimination."

Continuing page 39, counsel stated, "The decisions of the Supreme Court [of Ohio], demonstrate that a taxpayer is entitled to reduction in his assessment if that is required in order to assure him equal treatment." Citations included *Exchange Bank of Columbus v. Hines* (1853), 3 O. S. 1, 15; *Mitchell & Watson v. The Treasurer of Franklin County* (1874), 25 O. S. 143, 156, 158; *The Fair Store Co. v. Board of Revision of Hamilton County* (1945), 145 O. S. 231, 232.

In answer to petitioner's argument on page 8 that finding true value in money precludes consideration of discrimination in levying taxes, we observe the same counsel's contrary opinion in its Lincoln Electric brief on page 41:

> "This Board (Ohio Board of Tax Appeals) has also recognized that, in passing on the statutory 'true value in money,' regard must be given to the taxpayer's claim of discrimination and his right to uniformity of treatment."

Thereupon counsel quoted a number of authorities to support the above statement, including *Hamilton Amusement Company v. Board of Revision of Hamilton County* (1952), 1 Ohio Tax Cases 10,317, noting CCH Paragraph 200-125; *Woolworth Co. v. Cuyahoga County Board of Revision* (1952), 1 Ohio Tax Cases 10,457, noting CCH

Paragraph 200-167; *Sun Oil Co. v. Cuyahoga County Board of Revision* (1953), 1 Ohio Tax Cases 10,529, noting CCH Paragraph 200-198; *Sears, Roebuck and Co. v. Montgomery County Board of Revision* (1953), 1 Ohio Tax Cases 10,561, noting CCH Paragraph 200-210; *Linger v. Board of Revision of Hancock County* (1952), 1 Ohio Tax Cases 10,622, noting CCH Paragraph 200-230; *Ratliff v. Board of Revision of Hamilton County* (1952), 1 Ohio Tax Cases 10,451, noting CCH Paragraph 200-164.

Counsel for petitioner in its Lincoln Electric brief then concluded (page 42):

> "It follows, therefore, that neither the decisions of the Supreme Court nor those of this Board bar consideration by the Board of the taxpayer's claim to the benefits of the constitutional demand of uniformity."

Counsel was persuasive. The Board of Tax Appeals decided the case in favor of the Lincoln Electric Company, fixing the value of the new building at $3,698,360 although the actual cost of construction incurred on tax lien date as conceded by the company was $6,396,835.

Petitioner's quotation on page 7 from *Rollman & Sons Co. v. Board of Revision of Hamilton County,* 163 O. S. 363, 127 N. E. 2d 1 (1955), refers to still another alternative remedy. It was not used by the parties nor before the court in that case. Nor is it in this. The lower boards and court there found a failure of evidence to prove taxpayer's claim of improper functional depreciation. On the issue of discrimination among taxpayers, the court said that "primarily each county auditor adjusts the values, and in the absence of proof to the contrary it is presumed that each county auditor fulfilled this duty in his county." (127 N. E. 2d 6.)

Other cases cited, in a footnote to page 7 of the petition for certiorari, are from the 1920's, which preceded, and brought about the enactment of Sec. 28 U. S. C. A. 1341.

2. **Does a complaint that commercial real estate has been classified distinct from residence property for purposes of taxation, permitted by the United States Constitution, but purportedly prohibited by the Constitution of the State of Ohio, present a federal question?**

The district court answered "no," and was affirmed by the circuit court. We submit these judgments agree with the law as enunciated by this Court.

The Federal Constitution does not prohibit classification of real property for taxation. The states may, consistently with the Federal Constitution, classify property for taxation. They may set up different modes of assessments, valuation and correction, and may tax some kinds of property at higher rates than others. *Nashville C. & St. L. R. vs. Browning*, 310 U. S. 362, 60 S. Ct. 968, 84 L. ed 1254 (1940); *Coulter vs. L. & N. Ry.*, 196 U. S. 599, 25 S. Ct. 342, 49 L. ed. 615 (1905).

To come within the purview of the federal constitution it is necessary, as pointed out in the opinion of Judge Connell, that the discriminatory treatment be such as to subject the taxpayer to taxes not imposed on *others of the same class*. The District Judge cited *Hillsborough v. Cromwell*, 326 U. S. 620, 90 L. ed. 358 (1946), and quoted from it in his opinion as follows (Pet. cert. 16):

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on *others of the same class*. The right is the right to equal treatment. He may not complain if equality is achieved by

increasing the same taxes of the other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a state does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes *of other members of the class.*' " (Emphasis supplied by the District Court.)

Referring to *Hillsborough v. Cromwell,* Judge Connell further said (Pet. cert. 17):

> "This decision indicates quite clearly that unless there is an allegation of discrimination within a class or an attack on the validity of the classification itself, there is no denial of equal protection and hence, no presentation of a 'federal question.' "

The relief appellant seeks is not for the benefit of the class of commercial property owners. What it seeks in effect is discriminatory treatment in its favor, for it is quite obvious that relief to the entire class of property owners is not requested and cannot be granted in this cause. Appellant if successful will have favored treatment not accorded to all other taxpayers of the same class.

This judgment, here sought to be reviewed, is quite in accord with the law as stated by this Court in *Nashville, Chattanooga & St. Louis Railway v. Browning et al., Constituting the State Board of Equalization of Tennessee,* 310 U. S. 362, 84 L. ed. 1254 at 1257:

> "It must be emphasized that the Company makes no claim that its property is singled out from among other public service corporations for discrimination. Its asserted grievance is common to the whole class. We must put to one side therefore all those cases relied on by the petitioner which invoked the Fourteenth Amendment against discriminations invidious to a particular taxpayer."

The Court then cited as therefore not in point, inter alia, cases relied on in the petition for certiorari, page 6, *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U. S. 239 (1931); *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441 (1923); *Greene v. Louisville & Interurban Railroad Company*, 244 U. S. 499 (1917).

This Court continued at 1257:

> "All these cases are inapposite. None denied power to a state to apply different yardsticks to different classes of property. Equally irrelevant are those cases in which this Court, because of the nature of the litigation, was construing the uniformity clause of a state constitution, and was not applying the Fourteenth Amendment. This court has previously had occasion to advert to the narrow and sometimes cramping provision of these state uniformity clauses, and has left no doubt that their inflexible restrictions upon the taxing powers of the state were not to be insinuated into that meritorious conception of equality which alone the Equal Protection Clause was designed to assure. See Puget Sound Power & L. Co. v. King County, 264 U. S. 22, 27, 68 L. ed. 541, 546, 44 S. Ct. 261."

Whatever may be this taxpayer's claim under the state constitution and laws there is here no discrimination in a federal sense, and there being no violation of the federal constitution, there is here presented no federal question. In short, a question under the state constitution obviously does not in itself raise a question under the federal constitution.

The Federal Court decided it had no jurisdiction of a complaint grounded upon a violation of state law in *Baker, County Treasurer v. Atchison, T. & S. F. Ry.* (CCA 10th, 1939) (certiorari denied 308 U. S. 620), 106 F. 2, 525. The railroad challenged a tax on the ground of excessive

valuation of its property in claiming violation of the equal protection clause of the Fourteenth Amendment. The Federal court, dismissing the bill for want of jurisdiction, said that if the challenge were sustained the tax would be erroneous and illegal within the Colorado statute authorizing a suit at law in the State court to recover an erroneous or illegal tax. Hence, the railroad was not entitled to the Federal court's aid since it had an adequate remedy at law in the State court, citing Judicial Code 24 (1) as amended by the Act of 1937, 28 U. S. C. A. 41 (1). The court further held that Federal courts should reluctantly interfere by injunction with the fiscal affairs of the State (syl. 6), and that the State courts bear responsibility with Federal courts to guard and protect rights secured by the Constitution of the United States (syl. 7).

28 U. S. C. A. 41(1) quoted by the court is now 28 U. S. C. A. 1341, which provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state. June 25, 1948, c. 646, 62 Stat. 932."

The federal courts have traditionally declined jurisdiction under this and predecessor statutes in state tax cases. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, 63 S. Ct. 1070, 87 L. ed. 1407 (1943); *Hackensack Water Co. v. North Bergen Tp.*, D. C. N. Y. 103 F. Supp. 133 (1952), affirmed 200 F. 2d 313; *Reiling v. Lacy*, D. C. Md., 93 F. Supp. 462 at 467 (1950), dismissed 341 U. S. 901, 71 S. Ct. 614, 95 L. ed. 1341.

The opinion here of the U. S. Court of Appeals that first resort is to the state courts and then to the U. S. Supreme Court is supported in *In re New York, S. & W. Ry.*

Co., D. C. N. J., 36 F. Supp. 158 (1940); *Lawrence Print Works v. Lynch*, C. C. A. Mass., 146 F. 2d 996 (1945), citing *Matthews v. Rodgers*, 284 U. S. 521, 52 S. Ct. 220 (1932).

There is no federal jurisdiction here and the case is res adjudicata because petitioner began his complaint before the Ohio tax tribunals and then, following adverse decisions, took no appeal, but permitted the decision of the Ohio Board of Tax Appeals to become final and conclusive. *Autokefalos Orthodox Spiritual Church of St. George, The Tropeophoros v. Hallaban*, D. C. N. Y., 103 F. Supp. 389 at 390 (1952).

Finally, inasmuch as the opinions of the court below did not say that state jurisdiction necessarily defeats federal jurisdiction, nor did they say a federal court cannot enforce a state right, cases on pages 10-13 of the petition are not in point.

CONCLUSION.

Petitioner has misconstrued the reasoning of the U. S. Circuit Court in finding for respondents. It did not hold state jurisdiction necessarily bars federal jurisdiction.

The remedies provided by the State of Ohio were adequate. This Court has said so, and the court of appeals so held.

Construction of the Ohio Constitution is a state question. Mere anticipation or allegation of a denial of equal protection of the laws does not make it a federal question.

On the contrary, the presumption is that the State courts will enforce the United States Constitution. Should they so fail, there is an appeal to federal jurisdiction, as the Circuit Court said in its opinion (Pet. appendix 19).

This was sound law, conducive to an orderly separation of authority and work between the United States and the State of Ohio courts.

Accordingly, we respectfully submit judgments below were in accord with law, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK T. CULLITAN,

Prosecuting Attorney of Cuyahoga County, Ohio,

SAUL S. DANACEAU,

Assistant Prosecuting Attorney,

SHELDON CLARK,

Assistant Prosecuting Attorney,

Counsel for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 392.

UNION PROPERTIES, INC.,

Petitioner,

v.

FRANK M. BRENNAN,
Successor Treasurer of Cuyahoga County,
and
RICHARD C. WERNER,
Administrator of Estate of Leslie R. Monroe,
Deceased,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THOMAS V. KOYKKA,
EDWIN A. HOWE,
QUENTIN ALEXANDER,
1144 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for Petitioner.

October 29, 1956.

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No amount of argument can change the fact that the court below has cut down the jurisdiction given to the district courts by 28 U. S. C. § 1331.

The jurisdiction the Congress gave, the Court of Appeals has taken away.

1. Court Had No Right to Cut Down Jurisdiction Given by Congress.

It will not do to argue, as does respondent, that (page 12 of respondent's brief):

> "The Federal Constitution does not prohibit classification of real property for taxation. The states may, consistently with the Federal Constitution, classify property for taxation."

This is quite true.

But when a state chooses to put *all* real estate in a single class, subject to tax by a single uniform rule—as Ohio has done[1]—the taxing authority cannot, consistently with the Federal Constitution, tax one type of real estate on the basis of 100% of "true value" and another at 50% of "true value."

To do so is to deny equal protection.

That is this case.

And of it the Congress has given jurisdiction to the district courts under 28 U. S. C. § 1331. The Court of Appeals had no more right to deny that jurisdiction than it would have to grant a jurisdiction the Congress withheld.

2. Remedy Inadequate to Cure Wrong Need Not Be Pursued.

Respondent nowhere asserts that the state-provided administrative remedies are adequate to cure the wrong of discrimination. Respondent does so only obliquely by asserting that counsel argued in another case that the Ohio Board of Tax Appeals should consider the discrimination issue. (See respondent's brief, pp. 9-11.)

The short answer is that the Board of Tax Appeals rejected that argument.

Indeed, the Board of Tax Appeals rejected that argument in this very case. It held it had no jurisdiction of the issue of discrimination. (Petition, p. 8.)

The Supreme Court of Ohio rejects it also. *Rollman & Sons Co. v. Board of Revision of Hamilton County* (1955), 163 O. S. 363, 127 N. E. 2d 1. The Ohio rule is that the taxpayer complaining of discrimination may file

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[1] See petition for certiorari, p. 4, note 1.

(163 O. S. at page 366) "complaint as to undervaluations of the property of others * * *." This Court says that is no remedy. *Township of Hillsborough v. Cromwell* (1946), 326 U. S. 620, 623.

Manifestly, an administrative remedy inadequate to cure the wrong complained of need not be pursued.

CONCLUSION.

The Court of Appeals has revised the jurisdiction given to the district courts.

This Court should review.

Respectfully submitted,

THOMAS V. KOYKKA,
EDWIN A. HOWE,
QUENTIN ALEXANDER,
1144 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for Petitioner.

October 29, 1956.